No. 02-749

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IN THE

Supreme Court of the United States

RAYTHEON COMPANY,

Petitioner,

v.

JOEL HERNANDEZ,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE BETTY FORD CENTER, AMERICAN SOCIETY OF ADDICTION MEDICINE, NATIONAL COUNCIL ON ALCOHOLISM AND DRUG DEPENDENCE, NADDAC/THE ASSOCIATION FOR ADDICTION PROFESSIONALS, NATIONAL ASSOCIATION OF ADDICTION TREATMENT PROVIDERS, AMERICAN ASSOCIATION FOR THE TREATMENT OF OPIOID DEPENDENCE, INC., NATIONAL ASSOCIATION ON ALCOHOL, DRUGS AND DISABILITY, STATE ASSOCIATIONS OF ADDICTION SERVICES, JOHNSON INSTITUTE, LEGAL ACTION CENTER, AND INTERNATIONAL NURSES SOCIETY ON ADDICTIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST*

As described more fully in the Appendix, *Amici Curiae* are providers of treatment to people with addictions to alcohol and other drugs, as well as national associations of treatment professionals and others committed to combatting discrimination based on prior addiction experience. As part of our efforts to make recovery more attainable for people with chemical dependency problems, *Amici* have long supported research into the causes and treatment of addiction and played a leadership role in educating elected officials – and the public – about the realities of addiction.

Although, as we can attest, addiction can be a devastating, disabling condition, our experience also establishes – and a vast body of empirical evidence confirms – that it is a *treatable* one. Millions of Americans have overcome problems with chemical dependency and make vital contributions to the Nation's economy and its civic life.

We can also attest, however, that despite this demonstrable reality, individuals who have past experience with addiction regularly confront negative and inaccurate assumptions – *e.g.*, that their prior drug use is indicative of a "character defect" that makes them untrustworthy or dangerous. This pervasive prejudice and misunderstanding complicates the treatment process and operates, needlessly, to deprive the workforce of the contributions of many capable people.

As we describe herein, these realities were fully apparent to Congress when it enacted the Americans With Disabilities Act in 1990. Rejecting calls to limit that statute's protections to individuals with more "sympathetic" disabilities, Congress determined that there is no inconsistency between the aims of protecting individuals with a history of addiction against irrational exclusion and permitting employers latitude to address the *use* of drugs.

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*This brief was not authored in any part by counsel for a party, and no one other than *Amici* made a monetary contribution to its preparation or submission. Both parties have consented to its submission.

Amici are concerned that Petitioner in this case (supported by many of the Nation's largest employers) is urging the Court to construe the ADA in a way that would effectively nullify this important promise: that an individual's *history* of disabling addiction will not be permitted to define his or her lifetime employment opportunities. Because the text does not permit that interpretation, and because of the broad, adverse effects its adoption would have on the lives of the individuals we serve, *Amici* submit this Brief.

SUMMARY

In enacting the ADA, Congress acknowledged that, as with other disabling conditions, addiction to alcohol and other drugs is the subject of broad public misunderstanding and that, like other persons with disabilities, individuals who have experienced chemical dependency face widespread discrimination. Congress also forcefully recognized what many Americans still do not: that addiction is a treatable condition.

Consistent with these judgments, the ADA and its implementing regulations place addiction among the physical and mental impairments that trigger anti-discrimination protection, and the statute's text includes provisions specifically intended to assure that individuals who pursue treatment are protected against adverse action – and that employers' legitimate powers to address workplace drug *use* not become a means for closing off opportunity to those with a history of addiction.

Petitioner and its *Amici* insist that these statutory protections are not implicated in this case, because Raytheon's "real reason" for denying Mr. Hernandez's employment application was an (unwritten) company rule of lifetime ineligibility for applicants whose prior misconduct led to dismissal. Without disputing that such a policy would automatically (and perpetually) exclude an individual who has "completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs," *see* 42

U.S.C. § 12114(b)(1), and could do so based on drug use that occurred while in the grips of an addiction, Petitioner nonetheless urges the Court to pronounce it lawful *per se*.

As we explain at the outset, the record in this case raises serious questions as to whether the "policy" Petitioner would have the Court approve actually accounted for the employment action at issue. Before the EEOC, the Company essentially admitted that Respondent's application had been denied "based on" his of history drug use and on its perception that he had not overcome addiction, and the record discloses enough ambiguities and inconsistencies in the later-substituted "unwritten- policy" explanation that the decision below, holding summary judgment inappropriate, could readily be affirmed on that basis alone.

But even if application of the "policy," as described by Petitioner in this Court, were the "real reason" why Raytheon denied Respondent employment, its further contention, that such a policy should – without any showing of business necessity – be adjudged non-discriminatory as a matter of law must be rejected.

The burden of Petitioner's argument is that a lifetime hiring bar is not "discriminatory" within the meaning of the statute, (a) so long as it is triggered by the applicant's past use of drugs (*i.e.*, a past "violation" of a "rule" against having "drugs in [one's] system") rather than his past drug addiction – and (b) so long as it applies "the same" to individuals recovering from chemical dependency and to those, without any history of disability, previously terminated for "other" workplace misconduct.

But this argument reflects a serious misreading of the governing statute. The ADA's text makes clear that its prohibition against "discrimination" is not confined to the one or two "types" referenced in Petitioner's Brief. Rather, the statute's language expresses Congress's recognition that many of the practices that limit most severely the opportunities of individuals with disabilities – including those with a record of disabling addiction – do so

unintentionally. *See, e, g.*, 42 U.S.C. § 12112(b)(3)(A),(5),(6). Accordingly, Congress directed that even practices that only "tend to" screen out applicants with disabilities – not to mention the one defended here, which invariably excludes members of the protected class based on a defining trait of their disability – are lawful only if justified by business necessity. *See* 42 U.S.C. § 12112(b)(6).

Against that background, arguments that its policy does not discriminate "because of disability" because it focuses on "conduct" are unavailing. *It is axiomatic* that the class whom Congress undertook to protect – those with a history of addiction who have "completed a supervised drug rehabilitation program and [are] no longer engaging in the illegal use of drugs," 42 U.S.C. § 12114(b)(1) – will have, at *some past point*, committed the disqualifying "offense" of having "drugs in [their] system," and though Petitioner strains to present Hernandez's exclusion as triggered by some aggravating factor, such as "coming to work" or "working with missiles," Petitioner's own description is that a person's prior drug use while addicted will lead, "invariably," Br. at 2, to lifetime employment ineligibility.

Nor is Hernandez's acknowledgment that his earlier *termination* was permissible under the ADA of independent – let alone dispositive – significance in deciding whether a *no-hiring* policy is lawful. Congress explicitly provided that the latitude given employers to deal with employees' (and applicants') current drug use, *see* § 12114(a), *not be* construed as conferring authority to deny opportunity to individuals "no longer engag[ing]" in such activity, *id.* § (b)(1). Indeed, the primary rationale for this sharp textual distinction is that reasons that might legitimately support a summary-dismissal-for-drug-use policy do not apply when deciding whether to hire an individual who used drugs in the past but has overcome addiction.

Nor is it correct that the policy is "non-discriminatory" *per se* because it treats past drug use by an individual recovering from an addiction "the same" as "other" past

"aggravated workplace misconduct," unrelated to a history of disability. The text of the ADA forecloses any argument that facial even-handedness is the same as non-discrimination – and under any definition of discrimination, an employer's *reasons* for applying a policy are significant. To the extent, for example, such a policy rests on belief that hiring a person who used drugs in the course of a past, disabling addiction is "no different from" "giving [a] thief another opportunity to steal," it would seem to evince precisely the stereotypical thinking about addiction that Congress was determined not to tolerate.

Finally, although the ADA does not prohibit employers from adopting hiring exclusions that are uninfected by stereotypical judgments and supported by some genuine business necessity, the record in this case obviously cannot support summary judgment *for Petitioner* on that basis. The Briefs for Petitioner and *Amici* proffer numerous generic rationales for policies like Raytheon's, but, as we show, several of these – such as safety promotion and deterrence – are patently inconsistent with what the evidence shows this employer's actual practices to be, and others – including the claimed "fairness" of a blanket exclusion, relative to individualized consideration – are of doubtful legitimacy, let alone sufficiency, under the ADA. If anything, these attempts at justification (offered, paradoxically in the service of an argument that no explanation should be required) *highlight* the importance for further fact-specific inquiry.

I. The Decision Denying Petitioner Judgment As A Matter of Law May Be Affirmed On Narrow Grounds

Although the decision below relied – as did the parties – on the *McDonnell Douglas* framework, this case is plainly not the typical one where a court must decide between a plaintiff's assertion that her employer acted impermissibly based on some protected trait and the defendant's answer that its decision had nothing to do with her membership in

the statutorily protected class.

As we explain below, even if Raytheon's "policy" explanation is *credited*, there is no dispute that Respondent's drug use while previously addicted played a role in the employment decision, and courts in similar cases have held that the question of unlawful "discrimination" cannot be resolved definitively without considering the business need, if any, served by excluding the disabled employee. *See generally Tehan v. Metro-North Commuter R. Co.*, 951 F.2d 511 (2d Cir. 1991). But even under the *McDonnell Douglas* framework, the record raises enough doubts about the "policy" Petitioner asserts to be the "real reason" for denying Hernandez employment to make summary judgment inappropriate. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2001).[1]

First, the employer unequivocally asserted – in its official explanation to the EEOC – that its rejection of Hernandez's application was "*based on* [his] demonstrated drug use while previously employed *and* the complete lack of evidence indicating successful drug rehabilitation," J.A.

[1]Although *Reeves* concerned application of Fed. R. Civ. P. 50, it affirmed that "'the standard for granting summary judgment mirrors the standard for judgment as a matter of law, such that 'the inquiry under each is the same.'" 533 U.S. at 150 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986)).

To the extent the Court conducts the *McDonnell Douglas* analysis, it must accept that Respondent made out a *prima facie* case. The appeals court ruled both that Hernandez had a "record of disability" and that there were triable issues as to whether he was "otherwise qualified" when he applied in 1994. Raytheon did not seek review of those conclusions, nor are its arguments on these points, *see* Br. at 29 & n.5., fairly subsumed within what its certiorari petition identified as the question presented.

Petitioner's complaints notwithstanding, the standard applied by the appeals court, requiring Respondent to show that "his employer * * * refused to rehire him because of his disability," 298 F.3d at 1033, as part of his *prima facie* case, seems *more* demanding than *McDonnell Douglas* contemplates. *See Texas Dep't Comm. Affairs v. Burdine*, 450 U.S. 248, 253 (1981) (describing plaintiff's "burden as 'not onerous'"); *Ennis v. National Ass'n of Business & Educ. Radio, Inc.*, 53 F.3d 55, 57-58 (4th Cir. 1995) (noting need to modify fourth prong in ADA cases).

19a-20a (emphasis added). To be sure, that submission also adverted to Raytheon's "right," *id.*, to reject applicants whose employment had previously been terminated, but it did not reference a "policy" of doing so *automatically*. On the contrary, if denial were non-discretionary, one avowed "bas[is]" for its decision, the alleged insufficiency of evidence of "successful drug rehabilitation," would have been wholly beside the point.

Moreover, the "policy" defended here is, at most, "unwritten" – the only evidence attesting to it being the deposition of Raytheon's employee, Bockmiller, who is not the sort of "disinterested witness," *see Reeves*, 533 U.S. at 151, whose testimony a court deciding a Rule 56 motion must credit. And that testimony can be described as "undisputed," Br. at 30, only by ignoring its inconsistency with the *Company's own* prior explanation. *See Dominguez-Cruz v. Suttle Caribe, Inc.*, 202 F.3d 424, 432 (1st Cir. 2000) ("when a company, at different times, gives different and arguably inconsistent explanations, a jury may infer that the articulated reasons are pretextual"); *accord EEOC. v. Ethan Allen, Inc.*, 44 F.3d 116, 120 (2d Cir. 1994); *EEOC. v. Sears*, 243 F.3d 846, 852 (4th Cir. 2001); *Lawson v. CSX Transp., Inc.*, 245 F.3d 916, 931-32 (7th Cir. 2001); *Holiday v. Chattanooga*, 206 F.3d 637, 647 (6th Cir. 2000).[2]

And "[a]part from the late appearance of [Raytheon's] current explanation, there is additional evidence from which a factfinder could infer that it is unworthy of belief," *Sears*, 243 F.3d at 853. An inference of pretext is surely more compelling when, as here, the *initial* explanation was essentially an admission of discrimination, *see* J.A. 93a (EEOC determination of "reasonable cause" for finding ADA violation) – and when the "policy" belatedly asserted to support the decision was never committed to writing. *See,*

[2]Respondent surely did *dispute* Bockmiller's testimony, and, in fact, identified some basis for disbelieving it. Her testimony, for example, that she remembered Hernandez's application but "did not recall" seeing the letter concerning Hernandez's Alcoholics Anonymous participation – which apparently was forwarded along with it – was suspect. J.A. 53a-54a.

e.g., *Piraino v. Int'l Orientation Resources, Inc.* 84 F.3d 270 (7th Cir. 1996); *Sarsha v. Sears, Roebuck & Co.* 3 F.3d 1035 (7th Cir. 1993); *Dunning v. National Indus., Inc.*, 720 F. Supp. 924, 931 (M.D. Ala. 1989) ("[u]nwritten policies, as opposed to written policies, can be easily turned into tools of discrimination").

A claim of unwritten policy deserves less credence when made by a large company – which, the record shows, developed highly reticulated, written policies concerning other, presumably less pressing matters (such as the consequences for future *temporary* employment of a positive drug test by a *temporary* employee), and where no mention of the "policy" was made by an individual (Medina) whose familiarity with Company practices could be presumed.

Indeed, significant questions persist about the contours of the "unwritten" policy. Thus, while the Company depicts its rule as applying "the same" to individuals who resign "in lieu of termination," Br. at 6, as to those who are dismissed, there is no evidence, apart from self-serving testimony, to support that assertion – nor any that employees were aware that "resigning" would have that consequence (an odd gap, in view of the deterrent benefits claimed for the lifetime rehiring ineligibility "policy," *see infra*).[3] Similarly, that the Company's *written* policies address drug use (including sanctions therefore) distinctly from other "misconduct," *see* J.A. 81a-86a (discussing Policy 3-0-17), is further reason to doubt the assertion that a unitary *unwritten* "rule" governs all re-hiring decisions.

There are also inconsistencies concerning what triggers the policy. Although Raytheon insists here that "[t]he drug test and its results were not the violation," Br. at 17, the EEOC submission unambiguously indicated that Hernandez

[3]Although elsewhere in its brief, *see* Br. at 25 n.3, Raytheon emphasizes that Hernandez, as an "incumbent Hughes employee" * * * had notice of," Company rules, it offers no explanation why Respondent, whose employment dated back 25 years, applied for employment, unaware of any "policy" making him ineligible *per se*.

was "discharged for * * * **testing positive**" – and *did not* allege violation of rule provisions concerning "use of or being under the influence of illegal drugs during work time." J.A. 20a (emphasis by Petitioner). And contrary to the depiction of the no-hiring rule as unyielding, Raytheon actually stressed to the courts below that it had made Hernandez an offer of employment in 1999.[4] Finally, as we develop below, although Petitioner and *Amici* proffer a series of justifications for a hypothetical "blanket policy," these fit poorly with what the record shows this employer's actual practices to have been, and there is no evidence as to what purposes the *Raytheon* "policy" might actually have been intended to serve. *See* 298 F.3d at 1037 n.19; *cf. Nashville Gas Co. v. Satty*, 434 U.S. 136, 142 (1977) ("since there was no proof of any business necessity adduced with respect to the policies in question, [trial court] was entitled to assume no justification exists") (citation omitted).

II. Absent Proof of Business Necessity, A Policy That Excludes Individuals Who "No Longer" Use Drugs, Based On Prior Use Before Seeking Treatment For Addiction, Violates The ADA

A. The ADA Fully Protects Individuals With A History Of Addiction To Alcohol And Other Drugs From Discrimination On That Basis

The text, structure, and history of the Americans with Disabilities Act leave no doubt that Congress included individuals with a history of addiction to alcohol or illicit drugs within the statute's protections. *See* H.R. Rep. No. 101- 485(II) at 51 (1990) ("[t]he term [disability] includes * * * such conditions * * * as * * * drug addiction[] and alcoholism"); *accord* 28 C.F.R. § 35.104(1)(ii), (5)(iii); 42 U.S.C. § 12102(2)(B) (protecting individuals with a "record

[4]Although Petitioner's Brief presents termination and ineligibility for rehire as "invariable" consequences of ingesting drugs, Br. at 2, the record seems to indicate that Raytheon did not "invariably" terminate employees for the "offense" of "reporting to work with drugs in [their] system." *See* J.A. 81a (quoting policy).

of"disabling impairment).

> As the EEOC Technical Assistance Manual explains:
>
> Persons addicted to drugs, but who are no longer using drugs illegally and are receiving treatment for drug addiction or who have been rehabilitated successfully, are protected by the ADA from discrimination on the basis of past drug addiction.

Id. § 8.5; *accord* U.S. D.O.J. Technical Assistance Manual § 2.5000 (1993)("The ADA protects * * * those with a record of [disabling] impairment. This protected group includes - A person * * * who has recovered from mental or emotional illness, drug addiction, alcoholism, heart disease, or cancer"); 135 Cong. Rec. S10774 (1989) (Kennedy) ("The act expressly includes individuals who have successfully completed a supervised drug rehabilitation program or who have otherwise been rehabilitated, and no longer use illegal drugs, within the definition of individuals with a 'disability.' Therefore, persons who are subjected to discriminatory actions because of a history of illegal drug use which they have successfully overcome are fully protected by the ADA").

Such protection is not novel to the ADA. *See id.* at S10801 (Simon) (describing ADA as "[r]etaining * * * crucial protections for persons who have recovered or are in treatment"). In the Comprehensive Alcohol Abuse and Alcoholism Prevention Treatment and Rehabilitation Act of 1970, Pub. L. 91-616, Congress provided that "no person may be denied or deprived of federal civilian employment or a federal professional or other license or right solely on the ground of * * * *prior* alcoholism," *id.* § 201; 42 U.S.C. § 290dd (b)(1), and, in 1977, the Attorney General issued a formal opinion concluding that the employment discrimination provisions of the Rehabilitation Act extended to chemically dependent individuals, 43 Op. Att'y Gen. 75 (1977). That conclusion was ratified in administrative regulations, *see* 42 Fed. Reg. 22,686 (May 4, 1977), and then by statutory amendment, Pub. L. 95-602; *see Nassau Sch. Bd. v. Arline*, 480 U.S. 273, 285 n.14 (1986); *Bragdon v. Abbott*, 524 U.S. 624, 632 (1998) (noting 42 U.S.C. § 12201(a), "directive * * * to construe the ADA to grant at least as much protection" as provided under the Rehabilitation Act). *See also* 24 C.F.R. § 100.201(a)(2) (identifying drug addiction and alcoholism as "impairment[s]" for purposes of Fair Housing Act prohibition against disability discrimination).

The decision to reaffirm this protection – which was reached after substantial debate, *see, e.g.*, 135 Cong. Rec. S10775 – reflects Congress's judgment (1) that individuals with a history of addiction are subject to the same sorts of arbitrary, unthinking prejudices that limit the full participation of other persons with disabilities; and (2) that, contrary to widely held assumptions, chemical dependency is a treatable condition. *See United States v. Southern Mgm't*, 955 F.2d 914, 923 (4th Cir. 1992) ("Congress intended to recognize that addiction is a disease from which, through rehabilitation efforts, a person may recover, and that an individual who makes the effort to recover should not be subject to * * * discrimination based on society's 'accumulated fears and prejudices' associated with drug addiction").

First, Congress repeatedly has acknowledged similarities between chemical dependency and other medical and psychiatric conditions that qualify as potentially disabling impairments under the ADA. *See* H.R.Rep. No. 100–711 at 22 (1988) (describing "former drug-dependent persons" as "[j]ust like any other person with a disability, such as cancer or tuberculosis); H.R. Rep. No. 91-1663 (1970) (alcoholism is "no more moral or immoral than tuberculosis or schizophrenia"). Congress has often referenced the judgments of leading public health and medical associations classifying addiction alongside other disorders or medical conditions, *see id.*, as have other branches of the federal government. *Linder v. United States*, 268 U.S. 5, 18 (1925); 43 Opp. Att'y Gen at 80 n.4.[5]

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[5]Although there has been long-running debate within the treatment community as to the utility of describing addiction as "a disease," there is

Even more clear are the similarities between the problems of prejudice and discrimination that confront individuals who have experienced addiction and those faced by other individuals with disabilities. The legislative findings supporting enactment of the ADA, *see* 42 U.S.C. § 12101(1)-(9), apply with full force to the experiences of many Americans who are or have been addicted to alcohol and other drugs. *See Arline*, 480 U.S. at 285 n.14 (Congress "understood the danger of improper discrimination against such individuals").

"Stereotypic assumptions," 42 U.S.C. § 12101(7), have long characterized attitudes toward individuals with addiction. In *Arline*, this Court cited discrimination based on a history of chemical dependence as the prototypical "discrimination on the basis of mythology," and "[m]any continue to see addicted people as immoral, weak-willed, or having a character defect," DISPELLING THE MYTHS Ch. 8; *see* H.R. Rep. No. 91-1663 (1970) (deploring "atmosphere of moral disapproval surrounding the entire subject, and the deplorable custom of treating alcoholics as sinners or criminals"); *MX Group, Inc. v. City of Covington*, 293 F.3d 326, 342 (6th Cir. 2002) (summarizing evidence that treatment facility's clients' "status as recovering drug addicts was consistently equated with criminality," in affirming conclusion that actions based on these "unfounded

no dispute that addiction has biological and genetic *dimensions*. *See* NATIONAL ACADEMY OF SCIENCES, INSTITUTE OF MEDICINE, DISPELLING THE MYTHS ABOUT ADDICTION at 37 (reviewing evidence that addiction "causes long-lived alterations in the biochemical and functional properties of selected groups of neurons in the brain").

It has also been forcefully shown that many of the intuitive bases for distinguishing chemical dependency from other medical conditions do not withstand scrutiny. For example, although initial drug use is volitional, the etiology of many health problems – including hypertension, heart disease, and diabetes – also have important behavioral dimensions. *See* PHYSICIAN LEADERSHIP ON NATIONAL DRUG POLICY, POSITION STATEMENT (1997) 10-11 (noting that "no person eats fatty foods with the purpose of developing heart disease, * * * just as no drug user begins * * * with the hope of becoming addicted"); *see also infra* (noting similar treatment efficacy rates).

fears and stereotypes * * * violate[d] the ADA").[6]

Bound up with these prejudices concerning the nature of addiction are widely held, damaging – and false – assumptions that treatment is futile. As the Institute of Medicine observed, "[o]ne of the most enduring myths about addiction is that treatment for these disorders is ineffective." DISPELLING THE MYTHS 73. For example, a survey of *physicians* found that overwhelming numbers described treatment as "very effective" for disorders such as hypertension (86 percent) and diabetes (69 percent), and almost none viewed treatment as "very effective" for alcohol dependence (4 percent) or illicit drug dependence (2 percent), Nat. Center on Alcohol & Substance Abuse, *Missed Opportunity: National Survey of Primary Care Physicians and Patients on Substance Abuse* (May 2000), data establishes that treatment effectiveness rates for these diverse conditions are actually comparable. *See* C. O'Brien & A. McLellan. "Myths about the Treatment of Addiction," 347 THE LANCET 237-40 (1996).[7]

These attitudes and misunderstandings have led to widespread, documented "[d]iscrimination against individuals with [past addiction] * * * in such critical areas as employment [and] housing," 42 U.S.C. § 12101(3). *See* Peter D. Hart & Assocs, "Faces of Recovery" (2001) (one in four respondents in nationwide survey of recovering individuals reported personally experiencing employment discrimination and one in five reported fear of being fired or

[6] *Cf.* Pet Br. at 30 (alluding to Respondent's "checkered past").

[7] Literally hundreds of outcome-focused studies, many conducted by the federal and State governments, establish the broad effectiveness of treatment. *See, e.g.*, U.S. SUBSTANCE ABUSE & MENTAL HEALTH ADMIN., THE NATIONAL TREATMENT IMPROVEMENT EVALUATION STUDY (1997); NATIONAL ASS'N OF STATE ALCOHOL & DRUG ABUSE DIRECTORS, TREATMENT WORKS: A REVIEW OF 15 YEARS OF RESEARCH FINDINGS ON ALCOHOL AND OTHER DRUG ABUSE TREATMENT OUTCOMES (1990); C. Marwick, *Physician Leadership on National Drug Policy Finds Addiction Treatment Works*, 279 JAMA 1149 (1998) (reporting analysis of more than 600 peer-reviewed research articles).

discriminated against if their history of addiction became known); *see also* Marks, "Jobs Elude Former Drug Addicts," *Christian Science Monitor* (June 4, 2002) (reporting estimate "that when a recovering addict is honest, he or she will get turned down for a job 75 percent of the time"). And numerous decisions under the Fair Housing Act and the ADA attest to the depth of misunderstanding and hostility toward individuals recovering from chemical dependency. *See, e.g, MX Group,* 293 F.3d at 342; *United States v. Borough of Audubon*, 797 F. Supp. 353 (D. N.J. 1991) (noting "outpouring of public bias against * * * persons recovering from drug or alcohol addiction"), *aff'd* 968 F.2d 14 (3d Cir. 1992).[8]

Congress's determination to protect those recovering from addiction is expressed in 42 U.S.C. § 12114, which, while confirming broad latitude for employer policies relating to employee drug *use*, *see id.* § 12114(a), also imposes a limit on those policies: they may not become a means for discriminating against once-addicted individuals who are "no longer engag[ing] in the illegal use of drugs," *id.* § 12114(b). *Cf. id.* § 12114(b)(3) (allowing adoption of "reasonable policies or procedures * * * designed to ensure that [such individuals are] no longer engaging in the illegal use of drugs"); 136 Cong. Rec. H2443 (1990) (Rangel) (describing provision as striking a "delicate balance").

This ADA's textual distinction reaffirms long-held judgments about the irrationality of excluding individuals who have overcome addiction and the importance of

[8]There is, similarly, no doubt that "[t]he continuing existence of unfair and unnecessary discrimination and prejudice [against individuals history of drug addiction] * * * costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity." 42 U.S.C. § 12101(8). *See, e.g.*, NATIONAL INST. ON ALCOHOL ABUSE & ALCOHOLISM, U.S. DEP'T OF HEALTH & HUMAN SERVS., SIXTH SPECIAL REPORT TO THE U.S. CONGRESS ON ALCOHOL AND HEALTH 22 (1987) (estimating annual cost of not employing individuals with addiction at over fifty billion dollars).

encouraging treatment.[9] As the sponsor of the 1978 Rehabilitation Act amendment had explained:

> [M]any recovered alcoholics and drug abusers perform competently and reliably in the full range of tasks, skilled or unskilled, hazardous or not, that make up the job market * * * * A blanket refusal to hire these individuals cannot be justified * * * *[T]he language makes clear that an employer cannot assume that a history of alcoholism or drug addiction * * * poses sufficient danger in and of itself to justify exclusion. Such an assumption would have no basis in fact, and the act does not permit it.

124 Cong. Rec. S37510 (1978) (Williams); *accord Davis v. Bucher*, 451 F. Supp. 791, 797 (E.D. Pa. 1978) ("Whatever undesirable characteristics may attach to current drug use * * * there is absolutely no basis for concluding that those characteristics will in every case persist after the use has ceased"); *see also N.Y. City Transit Auth v. Beazer*, 440 U.S. 568, 596-97 (1979) (Powell, J., concurring in part, dissenting in relevant part) ("there is no rational basis for an absolute bar against the employment of persons who have completed successfully a methadone maintenance program and who otherwise are qualified for employment"); Pres. Proc. No. 7,589, 67 Fed. Reg. 57,123 (Sep. 4, 2002) ("The vast majority of people in recovery are capable individuals who contribute to America's strength") (Commemorating "National Alcohol and Drug Addiction Recovery Month").

Moreover, as the legislative history confirms, Congress understood anti-discrimination protection to be an integral part of the broader "national commitment to encourage all those who need it to come forward for treatment." 135 Cong. Rec. S10774 (Kennedy). Thus, the provision's proponents

[9]Numerous other federal laws draw similar distinctions. *See, e.g.*, 42 U.S.C. § 1437n(e); 21 U.S.C. § 862(c); 28 C.F.R. § 67.635(a)(2)(ii); *see also* 41 U.S.C. § 702(a)(1)(E) ("Drug-Free Workplace" mandates satisfied either by "imposing a sanction * * * or [by requiring] satisfactory participation in a drug abuse assistance * * * program").

repeatedly described § 12114(b)(2), which entitles individuals "participating in a supervised drug rehabilitation program," to the same protection accorded those who "successfully completed" such a program, *id.* § (b)(1), as providing "incentive for treatment," 135 Cong. Rec. S10801 (Simon); *cf. id.* S10795 (Moynihan) ("To turn away from individuals who have recognized their addiction to drugs and alcohol and who have sought, successfully, treatment would indeed be a cruel hoax").[10] As these proponents repeatedly underscored, the aim of encouraging treatment is not an exception to, but rather an essential component of, the Nation's broader commitment to combatting substance abuse.

B. A Policy That Operates In The Manner Petitioner Describes Is Not Lawful *Per Se* Under the ADA

Petitioner does not dispute that the policy it describes would exclude – for life – an applicant who has "successfully completed a supervised drug rehabilitation program" and is "no longer engaging in the illegal use of drugs," *see* 42 U.S.C. § 12114(b)(1) – and would do so based on past drug use while addicted. Nor does Raytheon deny that disqualification under the policy is wholly unrelated to any individualized – or even generalized – assessment about the applicant's ability to perform the job he seeks.

Instead, Raytheon devotes great effort to demonstrating that the policy is not "discriminatory," on the ground that

[10]Congress also recognized a further important link between treatment and employment opportunity: as a growing body of research confirms, workforce participation has a significant, reinforcing effect for recovery. *See* E. Wolkstein, R. Bausch, & G. Weber, *Work As a Critical Component of Recovery* (2000) (available at http://www.med.wright.edu/citar/sardi/workAndRecovery.html); *see also* J. Platt, *Vocational Rehabilitation of Drug Abusers*, 117 PSYCHOLOGICAL BULLETIN 416 (1995); G. Valliant, *What Can Long-term Follow-up Teach Us about Relapse and Prevention of Relapse in Addiction?* 83 BRITISH J. OF ADDICTION 1147 (1988) ("Work provides structure to the addict's life and structure interferes with addiction"); R. Peters, T. Witty & J. O'Brien, *The Importance of the Work Family with Structured Work and Relapse Prevention*, 24 J. APPLIED REHABILITATION COUNSELING 3 (1993).

(1) individuals with disabilities suffer no "disparate treatment" – (a) because applicants are disqualified "based on" past violations of work rules concerning drug use, not their past of addiction; (b) because the ADA was no bar to their prior *termination* for engaging in the same "misconduct"; and (c) because the no-hiring policy applies "no differently" to individuals who used drugs while addicted than to non-disabled individuals who committed acts of "workplace misconduct" during prior employment. Under these circumstances, Raytheon insists, the ADA neither warrants nor permits inquiry into the purposes its policy is intended to serve. The matter is at an "end." Br. at 27.

1. Petitioner's Defense Fails To Respect The Statute's Definition of "Discrimination"

The error of this argument begins with its first premise: that "[d]isability discrimination under the ADA can occur in two ways: disparate treatment and failure to provide reasonable accommodation," *see* Br. at 11. "[D]isparate treatment" may indeed be the "'most easily understood type of discrimination,'" Pet. Br. at 15 (quoting *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609 (1993)), but as this Court has observed, "[t]he statutory definition of 'discriminat[ion]'" under the ADA "covers a number of things an employer might do to block a disabled person from advancing in the workplace," *Chevron U.S.A. Inc. v. Echazabel*, 536 U.S. 73, 86 (2002).

Thus, while Raytheon would have the Court to decide the case as if § 12112 consisted only of two sections – (a) and (b)(5) – the provision expressly defines prohibited "discrimination" to include an employer's use of "standards, criteria, or methods of administration * * * that have the effect of discrimination on the basis of disability," *see* 42 U.S.C. § 12112(b)(3)(A), as well as those which "screen out or tend to screen out an individual with a disability or a class of individuals with disabilities, unless * * * shown to be job-related for the position in question and * * * consistent with business necessity," *id.* § 12112(b)(6). *See also* § 12112(b)(1)

(prohibiting "classifying a job applicant * * * in a way that adversely affects the opportunities * * * of such applicant * * * because of the disability"); *cf.* SG Br. at 2 (acknowledging that "'Discrimination' can take several forms under the ADA").[11]

This statutory language expresses Congress's recognition that many of the practices that limit most severely the opportunities of individuals with disabilities do so unintentionally. *See* 42 U.S.C. § 12101(5); *Board of Trustees, Univ. of Alabama v. Garrett*, 531 U.S. 356, 374 (2001) (Kennedy, J., concurring) (noting that "[p]rejudice * * * * may result * * * from insensitivity caused by simple want of careful, rational reflection"). The main thrust of the Act is not to punish employers for acting on bad motives, but rather to open up job opportunities for individuals with disabilities (including those with a history of disability, 42 U.S.C. § 12102(2)(B)). *See Alexander v. Choate*, 469 U.S. 287, 295 (1985) (recognizing that "[d]iscrimination against the handicapped was perceived by Congress to be most often the product, not of invidious animus, but rather of thoughtlessness and indifference"); *id.* at 296-97 ("much of the conduct that Congress sought to alter in passing the Rehabilitation Act would be difficult, if not impossible to reach were the Act construed to proscribe only conduct fueled by a discriminatory intent").

But no encompassing understanding of "discrimination" is needed to perceive that adverse action triggered by an individual's past drug use when addicted *is* "because of" past addiction. The point is not that prior drug use is

[11]It is not immediately clear why the reasonable accommodation provision is spared the silent treatment Petitioner shows the other types of prohibited discrimination. *See* Pet. Br. App. (reprinting § 12112(b)(5) as part of the "statutory provisions involved" in the case). The provision was not mentioned in the decision below and, – unlike "disparate impact" – Respondent did not invoke it before the district court.

Whether or not these other practices are "'discriminat[ion]' in [the] ordinarily understood sense of that word," Br. at 11, is not controlling, where Congress has defined the term in the statute.

"correlated" with SG Br. at 15, or "somehow caused by," Pet. Br. at 15, past addiction. *It is definitional*. The DSM-IV-R and the United States Code – among many others – refer to *use* as a primary feature of addiction. *See* 42 U.S.C.§ 201(q) ("'drug dependent person' means a person who is using a controlled substance * * * and who is in a state of psychic or physical dependence, or both"); 21 U.S.C. § 802(1); DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 1994); *see also Den Hartog v. Wasatch Academy*, 129 F.3d 1076, 1086 (10th Cir. 1997) (noting that mental illness is typically "diagnosed on the basis of abnormal behavior"); *compare Hazen*, 507 U.S. at 611 (noting that age and years of service are "analytically distinct").[12]

To make this point less clear – and make the case more like those where an employee asserts that a "disability made me do it" – Petitioner strains to describe its denial of Respondent's application as based on some "aggravat[ing] * * * misconduct," Br. at 2, beyond the drug use characteristic of addiction. Thus, Petitioner says that Hernandez was not denied employment based on past drug use or "a drug test," but rather for the past "offense [of] reporting to work with drugs in his system" or "simultaneously working on missiles and using cocaine," Br. at 17.

But given that the Company, before the EEOC, highlighted the portion of its rule dealing with drug test results – and not for example, the one against "being under

[12]Petitioner also exaggerates the significance of evidence that the individual "decisionmaker" may not have been aware of the full details of Hernandez's case. Whether Petitioner could acquit Bockmiller *personally* of any improper motive, there is no contention that her basis for denying Hernandez's application was *unrelated to* his disability – or that Hernandez's drug use while addicted was not relied on *by Raytheon* in reaching the decision. *See Reeves*, 533 U.S. at 141 (impermissible characteristic must have "actually played a role in [the employer's decisionmaking] *process*") (emphasis added); *cf. Holiday*, 206 F.3d at 647 (applying ADA prohibition on "participating in a contractual or other arrangement that has the effect of subjecting a covered entity's qualified applicant or employee to * * * discriminat[ion" 42 U.S.C. § 12112(b)(2)).

the influence * * * of a[n] illegal drug during working time," – and given that cocaine metabolites stay "in [the] system" days and even weeks after use, *see* S. KARCH, DRUG ABUSE HANDBOOK 187 (1998), the "offense" of "coming to work with drugs in [one's] system," turns out to be little more than "taking drugs," Br. 17, while addicted.[13] Moreover, Petitioner has nowhere claimed that the "policy" applies differently to "working on missiles and using cocaine," as against, for example, "reporting for work [in the mail room] with drugs in [one's] system." And if, as Petitioner represents, "termination" is the "invariable" consequence of a positive drug test, Br. at 16, a distinction between being denied a job "based on" a prior drug test or "based on" prior termination is equally hollow. *See infra*.

But even if the distinction between the "offense" of having used drugs while addicted and the status of past addiction were more crystalline, it does not have the determinative significance that Petitioner claims. As numerous courts have held, the inquiry into *discrimination* under the ADA does not "end" when an employer shows reliance on a "technically neutral * * * proxy." *McWright v. Alexander*, 982 F.2d 224, 228 (7th Cir. 1992); *see also Den Hartog*, 129 F.3d at 1086 (rejecting "intrinsic dichotomy between disability and 'disability-caused misconduct'"); *Sullivan v. Vallejo City Unified Sch. Dist.*, 731 F. Supp. 947 (E.D. Cal. 1990) (exclusion of service dog was disability-based discrimination); *see also Arline*, 480 U.S. at 282 (rejecting argument "that * * * the contagious effects of a disease can be meaningfully distinguished from the disease's physical effects on a claimant"). Rather, these cases teach, the lawfulness of the excluding the individual with a disability

[13]Although *Amici* inaccurately describe Hernandez as having engaged in "workplace cocaine use," EEAC Br. at 13, the record is clear that his "conduct" was having metabolites indicative of prior cocaine use in his system. Thus, Raytheon's Company Rule and Regulation 7 distinguishes between "use * * * of illegal drug during working time," and **"testing positive for * * * drugs on a *test* required by the Company,"** J.A. 20a (emphasis supplied in Petitioner's EEOC submission).

depends on whether the action can be justified with reference to business necessity. *See Tehan*, 955 F.2d at 517; *accord McDaniel, v. Mississippi Baptist Med. Center*, 869 F. Supp. 445 (S.D. Miss. 1994); *Wallace v. V.A. Admin.*, 683 F. Supp. 758 (D. Kan 1988); *Nisperos v. Buck*, 720 F. Supp. 1424 (N.D. Cal. 1989), *aff'd*, 936 F.2d 579 (9th Cir. 1991); *see also Ambrosino v. Met. Life Ins. Co.*, 899 F. Supp. 438, 440 (N.D. Cal. 1995).[14]

The reasons for requiring further justification are fully relevant here. First, as *Arline* explained, many of the prejudices and stereotypes that disadvantage individuals with disabilities actually relate to attributes of their impairment, rather than the individual's "status." *See McWright*, 982 F.2d at 228 ("discrimination 'because of' handicap is frequently directed at an effect or manifestation of a handicap rather than being literally aimed at the handicap itself") *Den Hartog*, 129 F.3d at 1087 (noting that "[m]ental illness is manifested by abnormal behavior"). Indeed, this is especially true of attitudes toward those with a history of addiction: there is no great animus toward

[14]Although the cited decisions arose under the Rehabilitation Act, the language of that statute, prohibiting decisions based "solely by reason of handicap," was *less* protective than that of the ADA. *See Bragdon*, 524 U.S. at 632.

While this recognition is especially prevalent in disability cases, similar decisions can be found in the many areas of law where "discrimination" is the ultimate issue. *See, e.g., Chalker v. Birmingham & Northwestern Rail Co.*, 249 U.S. 522, 527 (1919) (differential taxation based on location of "chief offices" would "[p]ractically * * * produce discrimination against citizens of other states"); *Fink v. City of New York*, 129 F. Supp. 2d 511 (E.D.N.Y. 2001) (Uniformed Service Employment and Reemployment Rights Act) (considering, and rejecting as "circular[], argument that a "decision to refuse [a returning veteran] a make-up exam had nothing to do with [his] veteran status, but rather, was based simply on the fact that the date for the exam had come and gone"); *Abraham v. Graphics Art Int'l Union*, 660 F.2d 811, 819 (D.C. Cir. 1981) (Title VII) (sustaining disparate treatment claim on ground that automatic termination for employees who do not return to work after 10 day leave meant that "oncoming motherhood was virtually tantamount to dismissal" and had a "drastic effect on women employees of childbearing age, an impact no male would ever encounter").

individuals *because they have completed treatment;* the prejudice that most concerned Congress is the false assumption that there is *no difference* between such an individual and a "current use[r]." To treat decisions based on past drug use as non-discriminatory would allow employers to give perfect expression to this prejudice.

Equally important: from the perspective of the member of the class whom Congress protected, a policy that denies employment based on past drug use is no different from one that expressly excluded applicants who "completed a supervised drug rehabilitation program and [are] no longer engaging in the illegal use of drugs," *see* 42 U.S.C. § 12114(b)(1). The same can largely be said for Congress's interest as well: the ADA makes explicit Congress's concern with the "*consequences* of employment practices, not simply the motivation," *Griggs v. Duke Power*, 401 U.S. at 432 (1971) (emphasis in original); *see, e.g.*, 42 U.S.C. § 12101(8). Congress's determination that there is no rational basis for broadly excluding individuals with a history of addiction – and its affirmative commitment to "their full reintegration into society," 135 Cong. Rec. S10774 (Kennedy) – would be for naught if employers could rely on "neutral" past-"misconduct" policies to exclude such individuals. "To permit employers carte blanche to [exclude] employees with [history of addiction] on the basis of [prior drug use] would largely nullify the ADA's protection" of those recovering from addiction, *Den Hartog*, 129 F.3d at 1087; *see also Arline*, 480 U.S. at 282 (noting "unfairn[ess]" of "allow[ing] an employer to * * * use [a] distinction [between condition's effects on others and on employee] to justify discriminatory treatment").

The statutory structure lends further support to the rule that invocation of a "technically neutral" rationale cannot be dispositive. Given that the ADA unambiguously defines as unlawful "discrimination," employer practices that "tend[] to" disqualify applicants with disabilities – by operation of statistical *correlation*, rather than any close causal nexus,

see, e.g., Wallace v. Debron Corp., 494 F.2d 674, 676 (8th Cir. 1974) (challenging policy of discharging employees with multiple wage garnishment for disproportionately burdening African Americans) – it is wholly implausible that a practice that *invariably* excludes members of the protected class *based on* a defining trait of their disability could be lawful without any comparable inquiry.[15]

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[15]Although the Solicitor General, citing the Ninth Circuit's observation that Respondent did not plead a "claim of disparate impact," 298 F.3d at 1037 n.20, urges that the case should be decided – against Respondent – on a "disparate treatment" theory alone, Br. at 17, that proposal is problematic. To the extent that Hernandez's claim might be described as challenging the "effect" of a "neutral policy," it would not require statistical proof of correlation between the ground for disqualification (drug use) and his membership in protected class. *See Mitchell v. Board of Trustees*, 599 F.2d 582, 585 n.7 (4th Cir. 1977) (impact may found based on "judicial notice * * *that a facially neutral policy must in the ordinary course have a disparate impact on a protected group"); *see McWright*, 982 F.2d at 228 (emphasizing that "the distinction between disparate treatment and disparate impact becomes fuzzy at the border"); *see also Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 987 (1988) ("ultimate legal issue" is the same under both theories); *In re State of Alabama Employment Discrimination Litig.*, 198 F.3d 1305, 1322 (11th Cir. 1999).

Although the complaint did not single out any subsection of § 12112(b), Respondent did closely examine Petitioner's witnesses on the issue of business necessity, *see* J.A. 83a, and in resisting Petitioner's summary judgment motion, he argued that a policy of the kind claimed by Raytheon would have an impermissible disparate impact. The court of appeals itself used phrases such as "screen out," 298 F.3d at 1036, and "business necessity," *id.* at 1037 n.19, that are more commonly associated with the "impact" mode of proof. And it would be obviously inequitable to hold Respondent primarily accountable for delay in developing evidence concerning the effect of Petitioner's "policy." His complaint could not have anticipated that the Company would disavow the explanation it had advanced to the EEOC and substitute a "neutral" policy never invoked before the Commission.

To the extent, however, the Court accepts the Ninth Circuit's characterization of the issue, the proper disposition would not be, as the Solicitor General suggests, to reverse, but rather to dismiss the writ. Because, as the Government recognizes, SG Br. at 17, employer "policies" like the one discussed undeniably *are* amenable to challenge as "discriminatory" under the ADA – albeit under a subsection that Respondent understandably did not plead with great specificity – a

2. The Lawfulness Under the ADA of *Terminating* Employees Who *Engage in* Illegal Drug Use Cannot Settle The Legality of A *No-Hiring* Policy

Far from being self-evident, the proposition that "if the discharge is permissible, then there is no basis for attacking the correlative ban on rehiring," Br. at 17, is squarely at odds with the text of the ADA.

To begin with, the "policy" defended does not relate to the termination of employees who engage in drug use, but rather the hiring of those who "no longer" do. *See National Passenger R.R. v. Morgan*, 536 U.S. 101, 114 (2002) ("Discrete acts such as termination * * * or refusal to hire are easy to identify. Each incident * * * constitutes a separate * * * employment practice"). *See Herman v. City of Allentown*, 985 F. Supp. 569 (E.D. Pa. 1997) ("[t]he action that is the subject of this ADA suit is not the firing of the Plaintiff in the first place. * * * * Defendant had every reason to fire the Plaintiff * * * * The issue in this case is whether the Defendant discriminated against the Plaintiff through its actions that resulted in the failure to rehire the Plaintiff"); *see also McKenzie v. Dovola*, 242 F.3d 967 (10th Cir. 2001).[16]

This difference is of paramount importance, in view of the ADA's consistent, textual distinction between the rights of individuals who "currently engag[e]," § 12114(a), in illegal drug use and those who "no longer" do. *Id.* § 12114(b).

decision by this Court in Raytheon's favor would settle almost nothing. The precedent the Solicitor General cites, *Hazen*, is fundamentally different: unlike the ADA, the statute there in issue, the ADEA, did not include an express congressional directive foreclosing construing "discrimination" as limited to "disparate treatment." *Cf. Adams v. Florida Power*, 535 U.S. 228 (2002) (dismissing writ).

Raytheon's apparent position – that a "policy" could definitively be pronounced "non-discriminatory" in a case where the court declined to consider the full statutory definition – is more plainly untenable.

[16]Notably, Petitioner *already had* a (written) policy comprehensively addressing employees' drug use.

Thus, Petitioner posits that

> [w]hen Hernandez was discharged * * * Hughes held him "to the same standards [of] * * * behavior that [it uniformly applied] to other employees [even though the specific kind of] behavior [in which he engaged was] related to * * * drug use," 42 U.S.C. § 12114(c)(1). And, when it subsequently rejected Hernandez's application * * * it merely enforced its no-rehire rule, a 'qualification standard[] for employment * * * that [it applies] to other' employees who seek to be rehired. *Id.* § 12114(c)(4).

Br. at 24. But this reasoning derives its plausibility from the omission of language in the latter provision that makes clear that its application, like that of § 12114(a), is limited to an "employee who [currently] *engages in* the illegal use of drugs," *id.* (emphasis added). Indeed, this line of argument represents precisely the sort of bootstrapping that Congress intended § 12114(b) to protect against.

Nor is there anything remotely illogical about different legal rules applying to the firing and (re-)hiring of the same individual. On the contrary, such a difference is the inevitable and intended consequence of Congress's "accept[ance of] the concept of a rehabilitated addict," *Southern Mgm't*, 955 F.2d at 922. *Cf. Bazemore v. Friday*, 478 U.S. 385, 395 (1986) (*per curiam*) (pay disparities that had not been unlawful prior to extension of Title VII to State employers were actionable after the effective date, because "each [post-1972] paycheck" was a violation).[17]

3. The ADA Does Not Condone Policies That Thoughtlessly Equate Past Drug Use While

[17]The statute does not declare that terminating the employment of a person with addiction based on current drug use is not "discrimination." Rather, "if the use is current, the ADA does not apply." *Salley v. Circuit City Stores, Inc*, 160 F.3d 977, 980 (3d Cir. 1998); *see id.* ("Congress has obviated the need for us to determine the metaphysical question whether use is part and parcel of an addiction disability"); *compare Den Hartog*, 129 F.3d at 1086 (terminations based on conduct related to disabilities other than addiction must be job-related and justified by business necessity).

Addicted With Other Past "Misconduct"

Nor is it correct to that the no-hiring policy's "even-handedness" – disqualifying applicants who have no disability along with those with a record of addiction – disposes of any ADA objection. As explained above, the statutory language makes it "flatly wrong" to equate facial neutrality with non-discrimination. *Garcia-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638, 646 (1st Cir. 2000); *See Morton v. U.P.S.*, 272 F.3d 1249, 1258 (9th Cir. 2001) ("[a]n employer may require disabled employees as well as others to meet an across-the-board qualification standard *if it can establish the stringent elements of the business necessity defense*") (emphasis added); *Den Hartog*, 129 F.3d at 1086 ("As a general rule, an employer may *not* hold a disabled employee to precisely the same standards of conduct as a non-disabled employee unless such standards are job-related and consistent with business necessity") (emphasis in original).

But in an important sense, there is nothing inherently "neutral" about a policy judgment that, *for purposes of hiring ineligibility*, prior drug use while addicted is the "same" as "other" prior "aggravated workplace conduct," Br. at 2. In fact, the main reasons Petitioner and *Amici* advance for ineligibility policies are obviously *in*applicable to individuals who, chemically dependent during prior employment, later completed treatment.

First, the premise that in hiring an individual treated for chemical dependency after being dismissed, a company would risk "repeating [its] * * *earlier hiring mistake[]," Br. at 27, would seem to rest on the very stereotypes – that treatment is ineffective and that the applicant's past addiction experience is an indicator of some character flaw – the Congress repudiated. *See McKenzie*, 242 F.3d at 974 ("The conduct that precipitated McKenzie's resignation reflects her illness, not an absence of 'good moral character' that would cause her to fail a background investigation"); *cf.* SG Br. at 16 (the "'primary purpose'" of the ADA, is to

"'eliminate the stereotypical thought processes * * * that far too often bar those with disabilities from participating fully in * * * the workplace'") (quoting *US Airways, Inc. v. Barnett*, 535 U.S. 391, 401 (2002)). And while no-rehire policies might "guarantee that there will be no reoccurrence of [drug use]," EEAC Br. at 20, Congress intended that employers would use less draconian – more "reasonable" – means than lifetime bans to pursue that interest. *See* 42 U.S.C. § 12114(b)(3).

And to describe a denial of employment to a fully qualified individual based on drug use while in the grip of addiction (for which he or she later sought treatment) as "*result[ing] from the person's individual merit, as demonstrated by his or her [non]conformance with company rules of conduct,*" SG Br. at 16, is at odds not only with the ADA but with the premises that have guided federal policy concerning addiction and treatment policy for decades.[18]

Finally, it should be noted that both Raytheon policy and the text of the ADA stand against the notion of reflexively treating prior drug use "the same" as prior theft, violence, or sexual harassment. First, the statute's protection for current employees "participating in a supervised rehabilitation program," 42 U.S.C. § 12114(b)(2),

[18]Even less jarring assertions, concerning deterrence and workplace friction, apply with plainly diminished force to individuals who were terminated while addicted. The notion of an individual's being deterred from drug use by the prospect of dismissal with rehiring ineligibility – but emboldened by a rule of firing with the possibility of future consideration *after successfully completing treatment* – is patently incompatible with the impairment of control and judgment that are definitional to the condition of addiction. And there may be less "baggage" in the relationship between newly re-hired former employee and the employer, than Raytheon forecasts. Br. at 27. As one expert has noted (admittedly, using comparably broad generalities):

> People who come back from the grave of addiction are generally so grateful for the support that they received that they throw themselves into their work, becoming models of loyalty and productivity. Attendance problems become nonissues. Attitudes improve. They surprise everyone, including themselves.

J. FEARING, WORKPLACE INTERVENTION 16 (2000).

contemplates that an employee's informing her employer of an addiction problem (with the acknowledgment, implicit or explicit, of *past* violations of company policy concerning "coming to work with drugs in her system") cannot be basis for adverse action – although admission of past theft or violence presumably could be. *Cf.* Pet Br. at 33 (arguing that individuals with disabling addictions have duty to come forward). Moreover, although Raytheon, for purpose of this case, argues that its "unwritten" policy operates across the board, the evidence shows that the Company's *written policy* addressing drug use – and its consequences sanctions – are free-standing. *See* J.A. 81a-86a.

C. The Record Does Not Establish A Business Necessity For Disqualifying Respondent

Although Petitioner and *Amici* offer generalized explanations why an employer might benefit from a policy such as Raytheon's – as well as dire forecasts as to what would happen if the decision below were affirmed, *see, e.g.*, EEAC Br. at 22 (decision below "plac[es] employers in the untenable position of having to consider for rehire former employees who present a known and demonstrated hazard") *but see* 42 U.S.C. § 12113(b)) – the record is barren of *evidence* concerning the business purpose, if any, Raytheon intended its policy to serve. *See* 298 F.3d at 1037 n.19.

Some of the ones advanced most ardently by *Amici* are especially unpromising. As already noted, the assertion that automatic ineligibility rules serve a significant deterrent purpose is counterfactual as applied to the "misconduct" of drug use by an individual in the grips of an addiction. But there is a threshold problem here: benefits of "clear notice" and "strong deterrence," SG Br. at 20-21, cannot be claimed for a policy that is – unlike many of Raytheon's others – *unwritten* and about which Respondent, a 25-year employee apparently never knew.

Proffered safety rationales, *see* SG Br. at 20 (referring to "sensitive or high-risk positions"); *id.* (citing need to "guard other employees and the general public from physical

injury"), suffer similar embarrassments. First, there is no suggestion that the policy applies differently to jobs that are in any way safety-sensitive, *see EEOC. v. Exxon*, 203 F.3d 871, 874-75 (5th Cir. 2000); *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 44 (1987) (noting doubt that reinstated employee "would pose a serious threat to the asserted public policy [against 'operation of dangerous machinery by persons under the influence of drugs or alcohol'] in every job for which he was qualified").

Moreover, it is almost inconceivable that a policy that bars individuals, for life, from every position in the Company, could meet a business necessity standard. For example, federal regulations provide that (after an individualized assessment of fitness for duty) individuals previously removed for drug offenses "may be granted unescorted access and assigned duties" in "nuclear power plant protected areas," *see* 10 C.F.R. § 26.27, and Transportation Department regulations likewise provide for drivers who have been treated for chemical dependency to return to "safety-sensitive duty." *See* 49 C.F.R. § 382.121(b)(3); *see also* 14 C.F.R. Pt. 121, App. J (FAA program for restoring licenses of commercial pilots treated for substance abuse).[19]

Indeed, here, too, the generic arguments on Petitioner's behalf proceed with insufficient regard for what the evidence in this case could bear. If Raytheon actually believed that prior drug use made a job applicant a more dangerous

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[19]Thus, even as it recognizes that

> a law enforcement agency *might be able* to show that excluding an individual with a history of illegal drug use from a police officer position was necessary, because such illegal conduct would undermine the credibility of the officer as a witness for the prosecution in a criminal case,

the EEOC cautions that "even in this case, exclusion of a person with a history of illegal drug use might not be justified *automatically* as a business necessity, if an applicant * * * could demonstrate an extensive period of successful performance as a police officer since the time of drug use." EEOC Technical Assistance manual § 8.7 (emphasis added).

employee – a statutorily intolerable premise, in any event – it is impossible to explain why (1) its *written policy* (a) grants individuals who test positive for drugs on the date of their application an automatic right to apply one year later; and (b) allows temporary employees who commit the "offense" of "coming to work with drugs in [their] system" that same right; or (2) why individuals recently dismissed by other employers for doing so would be considered right away. *See* J.A. 81a-86a.

And while other generalized rationales may not be so flatly inconsistent with the record, their adequacy – and even legitimacy – under the statute is doubtful. Congress presumably considered – and surely rejected – arguments that "blanket rules" are more fair than ones where applicants are considered individually, based on their actual ability to do the job, *see PGA Tour v. Martin*, 532 U.S. 661, 668 (2001), and broad (unsubstantiated) assumptions that "friction" might arise or that a covered employer might have "to keep [more] detailed records" are not the sort that could support denying employment to qualified individuals, for life.

To the extent, however, that Petitioner could show that excluding individuals in Respondent's situation is genuinely necessary "to guard against safety hazards, comply with legal requirements, ensure product and service quality, maintain its reputation, and promote an atmosphere that is conducive to retaining good employees," EEAC Br. at 22, nothing in the ADA or the appeals court's remand decision should prevent it from doing so. *See* 42 U.S.C. § 12113.

Conclusion

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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DESCRIPTIONS OF *AMICI CURIAE*

Amicus Curiae Betty Ford Center was co-founded by former First Lady Betty Ford and Ambassador Leonard Firestone in 1982 in Rancho Mirage, California. The Center is a private, non-profit treatment center that accepts patients dependent on alcohol and other mood altering chemicals. After completing her own treatment for chemical dependency, Mrs. Ford recognized the need for a treatment center that emphasized the special needs of women, and while the Center treats both women and men who suffer from chemical dependency it saves half of its spaces for women. Each day, more than 750 people are touched by the work of the Betty Ford Center and nearly 300,000 people a year receive education or service from the Center's staff. The Center offers a variety of levels of care, specialty programs and other services for adult patients in a caring and confidential atmosphere. Levels of care include inpatient, day treatment, intensive outpatient, a therapeutic residential community, and focused continuing care. Specialty programs include gender-specific care for women and men and a program for persons who work in safety-sensitive or highly regulated professions, such as pilots, physicians, attorneys and the like. Because addiction affects the entire family, the Center also offers programs for family members, including children. The Betty Ford Center also offers educational programs for health care workers and addiction treatment providers to increase the knowledge and skills in this important field.

Amicus Curiae American Society of Addiction Medicine ("ASAM") is devoted to increasing access to and improving the quality of addiction treatment. ASAM members are physicians from all medical specialties and sub-specialties. They are engaged in private practice, serve as corporate medical directors, work in group practice or other clinical settings, and are also involved in research and education. Through its conferences, continuing medical education

courses, and publications, including the textbook, *Principles of Addiction Medicine (Third Edition, 2002)*, ASAM actively educates the medical community and the public about addiction disorders and diseases, treatment guidelines and practice parameters in the field of addiction medicine. ASAM staunchly opposes policies that create obstacles to or deter persons from receiving substance use treatment and counseling or discriminate against persons in recovery.

Amici Curiae National Council on Alcoholism and Drug Dependence ("NCADD") with its nationwide network of affiliates, provides education, information, and hope in the fight against the chronic diseases of alcoholism and other drug addictions. NCADD, founded in 1944, works to fight the stigma of addiction. NCADD's interest in this case speaks directly to their mission and their 60 year history of working to end discrimination against persons who are addicted to alcohol and other drugs which is a medical condition and not a moral failing.

Amicus Curiae NADDAC The Association for Addiction Professionals (formerly the National Association of Alcoholism and Drug Abuse Counselors, Inc.) is the nation's largest organization of alcohol and drug use disorder professionals. NAADAC has 13,000 members in 47 states. NAADAC's membership reflects a range of health care professionals specializing in addictive disorders. Science has shown that addiction is a brain disease that responds well to treatment, and NAADAC joins this brief because it is deeply concerned that if the decision below is reversed, will hurt our patients and their families. Addiction is a disabling disease, and to discriminate against somebody who has been through treatment for this disease is proscribed by the ADA. The membership of NAADAC believes that the opportunity for employment is an integral part of the continued rehabilitation of individuals and the communities they live in.

Amicus Curiae National Association of Addiction Treatment Providers ("NAATP") was founded in 1978 and represents almost 250 not-for-profit and for-profit providers. NAATP acts as the voice of private alcoholism and drug dependency treatment programs throughout the U.S. and plays a leadership role on behalf of treatment providers in areas such as treatment standards, education, research, and advocacy of legislative, regulatory and reimbursement positions supported by the field. The mission of NAATP is to promote, assist and enhance the delivery of ethical, effective, research-based treatment for alcoholism and other drug addictions. NAATP seeks to accomplish this mission by: (1) providing its members and the public with accurate, responsible information and other resources related to the treatment of these diseases; (2) advocating for increased access to and availability of quality treatment for those who suffer from alcoholism and other drug addictions; and (3) working in partnership with other organizations and individuals that share NAATP's mission and goals.

Amicus Curiae The American Association for the Treatment of Opioid Dependence, Inc. ("AATOD") was founded in 1984 as the Northeast Regional Methadone Treatment Coalition, Inc. Treatment providers joined together to support the legitimacy of methadone maintenance as a valuable treatment for opioid dependence and to increase the availability of comprehensive treatment services to people in need of care. The Northeast Coalition evolved into the national organization, known originally as the American Methadone Treatment Association, Inc., to better coordinate the efforts of methadone treatment providers throughout the United States, and adopted its current name in 2001 to better embrace all forms of opioid pharmacotherapy. AATOD is committed to upholding standards of quality in the comprehensive treatment of opioid dependence and to working with the federal agencies and state substance abuse authorities concerning opioid treatment policy and the development of opioid replacement

pharmacotherapies.

Amicus Curiae National Association on Alcohol, Drugs and Disability ("NAADD") promotes awareness and education about substance abuse among people with co-existing disabilities. NAADD's mission is to create public awareness of issues related to alcoholism, drug addiction, and substance abuse faced by persons with other co-existing disabilities, and to provide a peer approach to enhance access to services, information, education and prevention through the collaborative efforts of interested individuals and organizations nationwide. NAADD connects and supports individuals and organizations with an interest in substance abuse and disability; provides a federal and state government presence to increase opportunities for a high quality research and innovative local programming related to substance abuse and co-existing disabilities; generates and disseminates information about alcohol, drugs and disability; improves access to substance abuse treatment and community services for people with co-existing disabilities; convenes regional and national conferences; and mobilizes collaborative efforts to more efficiently communicate with policy makers.

Amicus Curiae State Associations of Addiction Services ("SAAS") is the only national organization of state alcohol and drug abuse treatment and prevention provider associations. The mission of SAAS is to ensure the availability and accessibility of quality alcohol and other drug treatment, prevention, education and related services throughout the country. SAAS promotes treatment, education, and research in the belief, supported by evidence, that addiction is a treatable disease and that people in recovery can and do lead productive lives in the community. Thirty-two state provider associations currently are members of SAAS, and they in turn represent more than 2000 community-based substance abuse provider agencies and thousands of programs and service projects. Programs represented by the SAAS state associations serve culturally

diverse populations dependent on publicly funded treatment and prevention services.

Amicus Curiae Johnson Institute has led the field in delivering effective prevention, treatment and recovery programs. The Institute's mission is to improve and expand the public's understanding of addiction as a treatable illness, and promote the power and possibility of recovery from alcoholism and other drug addiction. It is the position of the Institute that all individuals and families experiencing the harmful effects of alcohol or other drug addictions can find a path to recovery through early intervention, appropriate care, family involvement and community support.

Amicus Curiae Legal Action Center is a non-profit organization with offices in New York City and Washington, D.C., specializing in legal issues of concern to alcohol, drug and AIDS prevention/treatment communities. The Legal Action Center plays a major role in the policy debate and policy formulation on issues affecting individuals with alcohol and drug problems and their families, working to enact public policies which promote increased access to care for them. The Legal Action Center also provides legal representation to individuals who have faced discrimination because of their alcohol and drug dependencies. The *Hernandez* case raises issues of great importance to the Legal Action Center and the individuals and treatment programs it represents.

Amicus Curiae International Nurses Society on Addictions ("IntNSA") was founded in 1975 to promote evidence-based, comprehensive, state of the art nursing care for addicted patients and their families. IntNSA believes that all nurses must maintain a basic level of knowledge and skills in addictive disorders and that all nurses, regardless of their specialty or practice setting, can contribute to the promotion of healthy lifestyles and early identification of people at risk for developing substance use disorders. In the

same vein, IntNSA is committed to combating misleading stereotypes about addiction and recovery, and to removing barriers to employment, housing and social and medical services confronting many individuals in recovery.